Supreme Court, U.S.
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No. 99-1029

In The

Supreme Court of the United States

RENE M. DARBY,

Petitioner,

versus

INGALLS SHIPBUILDING, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fifth Circuit properly reject a Petition for Rehearing *En Banc* from a ruling on a non-dispositive motion for attorney fees?

2. Did the Fifth Circuit err in denying attorney fees under § 28(b) of the LHWCA for claimant's unsuccessful prosecution of a claim for an injury, even though claimant subsequently achieved partial success on a separate claim for a later aggravation of the injury?

3. Did the denial of attorney fees constitute an impermissible interference with claimant's right to counsel?

LIST OF PARTIES

The parties to this matter are the following:

1. Rene M. Darby, Petitioner
2. Blewett W. Thomas, Counsel for Petitioner
3. Ingalls Shipbuilding, Inc., which is a subsidiary of Litton Industries, Inc., Respondent
4. Director of the Office of Workers' Compensation Programs, Federal Respondent

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OPINIONS BELOW

On March 31, 1992, an administrative law judge of the U.S. Department of Labor awarded Rene Darby (Darby) limited temporary compensation and compensation for a scheduled injury to his arm resulting from an accident on September 24, 1987, while Darby was employed by Ingalls. The administrative law judge also awarded Darby's attorney an attorney's fee for the successful prosecutions of those issues.[1] Darby also sought compensation claiming he was permanently totally disabled from such accident.[2] The administrative law judge denied his claim for permanent total benefits. Darby appealed the denial of his permanent total claim. On February 24, 1995, the Benefits Review Board affirmed the denial. The Board also denied Darby's Motion for Reconsideration on November 22, 1995. Darby then appealed to the U.S. Court of Appeals for the Fifth Circuit. On November 13, 1996, the Fifth Circuit affirmed the Board's decision in part and vacated and remanded in part. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685 (5th Cir. 1996). Petitioner's Appendix A-6 – A-13.[3] On April 30, 1998, the administrative law judge entered his order on remand, denying Darby's claim for additional compensation benefits for the 1987 injury. *Id.*, A-14 – A-62. However, the administrative law judge had also consolidated Darby's

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[1] Such fee was paid by Ingalls.

[2] Darby also claimed a neck injury from the September 24, 1987, accident.

[3] Hereinafter "Pet. App." Respondent's Appendix will be cited as "Resp. App." and cites to Employer's Exhibits will be cited as "EX."

claim on remand with his claim for a separate injury which had later occurred at Ingalls on May 8, 1992. *Id.*, A-40.[4] Darby's attorney achieved partial success on the claim against Ingalls for the May 8, 1992, injury (the second claim), and Darby was awarded some continuing compensation and an attorney fee for that accident. However, Darby filed a Motion for Reconsideration seeking nominal continuing benefits for the injury of September 24, 1987 (the first claim), so that the statute of limitations would remain open as to that claim. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997). On July 17, 1998, the administrative law judge denied his request for reconsideration.

Darby's attorney next filed a motion for attorney fees for his unsuccessful appeals to the Benefits Review Board and the Fifth Circuit in connection with the September 24, 1987, accident. On June 11, 1999, a panel of the Fifth Circuit denied such motion. *Id.*, A-1. On July 13, 1999, the panel likewise denied a motion for reconsideration of the denial of attorney fees. *Id.*, A-2. Darby's attorney next attempted to file a petition for rehearing *en banc* with respect to the attorney fee issue, but the petition was returned by the Fifth Circuit clerk because there is no provision for filing an *en banc* petition from a non-dispositive order. Resp. App. 1. Thereafter, Darby's attorney filed a motion for the clerk to accept his *en banc* petition. On August 19, 1999, the Fifth Circuit denied the motion. Pet. App. A-3.

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[4] Claimant had filed a separate claim for the injury on September 6, 1996. *See* Employer's Exhibit 39.

The Benefits Review Board also denied Darby's motion for attorney fees on May 24, 1999. On August 20, 1999, the Board denied Darby's motion for reconsideration on the attorney fee issue. *Id.*, A-68 – A-72. Darby appealed to the Fifth Circuit. Ingalls moved to dismiss the appeal since the Fifth Circuit had already denied Darby's claim for fees in connection with his unsuccessful appeal of the September 24, 1987, claim. On December 2, 1999, the Fifth Circuit dismissed Darby's appeal as frivolous. *Id.*, A-4 – A-5.

It is from the Fifth Circuit's denial of attorney fees, the Fifth Circuit's dismissal of the appeal of the denial of attorney fees by the Benefits Review Board, and the Fifth Circuit's rejection of his petition for rehearing *en banc* that Darby seeks a writ of certiorari from this Court.

JURISDICTION

The orders of the Fifth Circuit denying attorney fees in this case were entered on June 11, 1999, and July 13, 1999. *Id.*, A-1 – A-2. The Fifth Circuit orders denying *en banc* consideration of the ruling on the non-dispositive attorney fee motion were entered on August 2, 1999, and August 19, 1999. *Id.*, A-3; Resp. App. 1. The Fifth Circuit order summarily dismissing the appeal of the Benefits Review Board's denial of fees was entered on December 2, 1999. Pet. App. A-4 – A-5. Jurisdiction of this Court to review the decisions of the Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves an interpretation of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901 *et seq.* The specific statute which is pertinent to this matter is 33 U.S.C. § 928(b). Resp. App. 2.

This case also involves a procedural issue in connection with Rule 35 of the Federal Rules of Appellate Procedure and the Fifth Circuit Local Rules with respect to a rehearing *en banc*.

STATEMENT OF THE CASE

Darby was employed as a joiner for Ingalls. On September 24, 1987, he sustained a neck and elbow injury while employed with Ingalls. He was eventually released by his treating physicians with a 15% disability to the arm and permanent limitations due to the cervical condition which prevented him from performing his regular duties. Ingalls accommodated his limitations by placing him in a modified joiner position which paid his regular wage. Notwithstanding his satisfactory performance of the modified job and his receipt of his regular wage, Darby pursued a claim for permanent total disability benefits pursuant to § 908(a) of the LHWCA. He also sought compensation for the scheduled injury to his arm. He continued performing the modified job at his regular wage from October 29, 1990, until the trial on October 2, 1991. Following the trial, the administrative law judge awarded Darby limited additional compensation for temporary disability pursuant to 33 U.S.C. § 908(b) and a

scheduled award for the arm injury pursuant to 33 U.S.C. § 908(c)(1). However, he denied Darby's claim for permanent total disability pursuant to 33 U.S.C. § 908(a), since he found that the modified job provided to Darby was suitable, necessary, permanent, and that his post injury wages exceeded his earnings at the time of injury. The judge also awarded an attorney fee pursuant to 33 U.S.C. § 928(b) for Darby's attorney's successful pursuit of the claim at that level. The additional benefits and attorney fee awarded by the administrative law judge were duly paid by Ingalls. EX 31, p. 2.

Darby appealed the denial of permanent total disability to the Benefits Review Board pursuant to 33 U.S.C. § 921(b), asserting that he was totally disabled from the September 24, 1987, accident despite the fact that he was working regularly. The Benefits Review Board affirmed the denial. Darby subsequently appealed the Board's decision to the Fifth Circuit. Attorney fees were not an issue in such appeal. On November 13, 1996, the Fifth Circuit affirmed in part and remanded in part for the administrative law judge to make a limited determination as to whether Darby's post injury earnings fairly and reasonably represented his wage earning capacity pursuant to 33 U.S.C. § 908(h). Pet. App. A-6 – A-13.

On remand, the administrative law judge found that Darby's earnings did fairly and reasonably represent his wage earning capacity and therefore denied any further compensation for the accident of September 24, 1987. *Id.*, A-40 – A-44. However, to avoid "needless delay . . . ," the administrative law judge consolidated the "relatively minor issue" on remand with a separate claim of Darby arising out of an accident which had occurred on May 8,

1992, while he was performing the modified work. *Id.*, A-40. In his order of April 30, 1998, the administrative law judge found that although Darby was not entitled to any additional benefits for the accident of September 24, 1987, he was entitled to permanent partial disability benefits for the accident of May 8, 1992. *Id.*, A-61.

Darby's attorney filed a motion for reconsideration of the denial of additional compensation for the accident of September 24, 1987. On July 17, 1998, the administrative law judge denied the motion and stated that although no additional compensation was awarded for the September 24, 1987, accident, Darby did receive compensation for the "separate and distinct" injury of May 8, 1992, which was an aggravation of the prior September 24, 1987, injury. *Id.*, A-64.

Darby seized upon the administrative law judge's award of additional compensation for the May 8, 1992, accident, and filed a motion for attorney's fees for time spent on his unsuccessful appeals in regard to his September 24, 1987, accident. On June 11, 1999, the Fifth Circuit denied the claim for attorney fees surrounding the 1987 accident. *Id.*, A-1. On July 13, 1999, the Fifth Circuit likewise denied Darby's motion for reconsideration of the denial of attorney fees. *Id.*, A-2. Darby filed a petition for rehearing *en banc*. The petition was returned to Darby by the clerk since there is no provision for *en banc* review from a non-dispositive order. Resp. App. 1. Darby then filed a motion for leave to file a petition for rehearing *en banc* which was denied by the Fifth Circuit on August 19, 1999. Pet. App. A-3.

Similar to the Fifth Circuit, the Benefits Review Board also denied Darby's claim for attorney fees on May 24, 1999. On August 20, 1999, the Board also denied Darby's motion for reconsideration citing the Fifth Circuit's denial of fees at that level. These orders were appealed to the Fifth Circuit. *Id.*, A-68 – A-72. On December 2, 1999, the Fifth Circuit dismissed Darby's appeal as frivolous, since it had previously found that his attorney was not entitled to similar fees. *Id.*, A-4 – A-5.

It is from the Fifth Circuit's denial of attorney fees, the Fifth Circuit's refusal to re-hear the motion for attorney fees *en banc*, and the Fifth Circuit's dismissal of the appeal of the Board's order denying fees that Darby seeks a writ of certiorari.

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

DID THE FIFTH CIRCUIT PROPERLY REJECT A PETITION FOR REHEARING *EN BANC* FROM A RULING ON A NON-DISPOSITIVE MOTION FOR ATTORNEY FEES?

Initially, Darby argues that the Fifth Circuit erred in rejecting his petition for rehearing *en banc* on the attorney fee issue. He contends that the Fifth Circuit did not have discretion to reject his petition, which deals with a non-dispositive issue. However, neither Rule 35 of the Federal Rules of Appellate Procedure nor the local rules of the Fifth Circuit regarding Rule 35 afford any procedure for seeking rehearing *en banc* under such circumstances. The

Fifth Circuit considers such an attempt by Darby as not rising to the level of exceptional importance as to justify *en banc* review by the entire Fifth Circuit. Resp. App. 1; Pet. App. A-3.

To be clear, the Fifth Circuit may regulate its practice in any manner consistent with federal law, the Federal Rules of Appellate Procedure, and the local rules of the circuit. FRAP 47(b). The procedural rulings of the Fifth Circuit in this case is fully in accordance with Rule 35 of the Federal Rules of Appellate Procedure, the Local Rules of the Fifth Circuit, and federal case law. Rule 35 provides in pertinent part as follows:

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

FRAP 35(a).

Likewise, the Fifth Circuit's local rules provide as follows:

> Caution. Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Federal Rules of Appellate Procedure 35(a). As is noted in Federal Rule of Appellate Procedure 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every

> active judge of the court and is a serious call on limited judicial resources.

Local Rule 35.1.

It is obvious that *en banc* consideration of a one-page unpublished summary denial of attorney fees in this case was not necessary to maintain the uniformity of the decisions of the Fifth Circuit. Likewise, the denial is not a question of exceptional importance. The denial does not even affect Darby's entitlement to benefits, since compensation was paid to him by Ingalls apart from the attorney fee issue. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 666 (7th Cir. 1982).

There is also no conflict in the circuits. In fact, the circuits are unanimous. In their view, *en banc* consideration of a case is reserved for only the most exceptional of circumstances and it defies logic that the denial of an attorney's fee to a claimant's attorney in a garden variety LHWCA case would justify such extraordinary use of judicial resources. The District of Columbia Court has noted that the power of a court of appeals to rehear a case *en banc* should be exercised sparingly. *Cafeteria & Restaurant Workers Union Local 473, AFL-CIO v. McElroy*, 284 F.2d 173 (D.C. Cir. 1960). The Second Circuit has noted that *en banc* reconsideration is a cumbersome procedure that should not be used more extensively than is necessary and useful. *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992). The Eleventh Circuit has concluded that a court of appeals should not rule *en banc* on issues which do not clearly merit consideration. *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985). The Fifth Circuit has ruled that *en banc* review is reserved for only the most important

federal issues and is prompted by the need for a definitive statement on the law by the full court. *In re Air Crash Disaster Near New Orleans, LA on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987).

In a case closely on point, the Sixth Circuit has held that *en banc* hearings are ordered only on appeals or other proceedings on the merits and not on preliminary motions. *Krakoff v. United States*, 431 F.2d 847 (6th Cir. 1970). Specifically, in *Krakoff*, the appellant filed a motion for oral argument before that Court *en banc* on a preliminary matter which was the subject of another motion.[5] Similarly, in *Butera v. Apfel*, 173 F.3d 1049 (7th Cir. 1999), the Seventh Circuit noted that the court of appeals is not obligated to reconsider an issue that has previously been resolved before a motions panel of the court. Accordingly, the Fifth Circuit in the present case was not obligated to accept a petition for rehearing *en banc* of the panel's denial of a non dispositive post-judgment motion for attorney fees, which had already been considered and reconsidered by the panel.

Darby argues that the ruling on his motion for attorney fees was a dispositive ruling which may be the subject of *en banc* consideration. To the contrary, his entitlement to attorney fees was not an issue when he appealed to the Fifth Circuit or when the Fifth Circuit rendered its decision on the merits in 1996. Pet. App. A-6 – A-13. Moreover, Darby cannot seriously argue that his motion for attorney fees was dispositive, since the ruling

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[5] There is no logical distinction between a non dispositive preliminary motion and a non dispositive post judgment motion such as we have in the present case.

on the fees did not resolve the underlying case on the merits. To the contrary, it was the underlying ruling on the merits, as supplemented by the decision on remand, which prompted the filing of the motion for fees. Accordingly, there is no logical basis for Darby's assertion that the denial of his attorney fees was a dispositive ruling on the merits which would entitle him to *en banc* rehearing.

Finally, Darby has failed to present any compelling reason, as required by Supreme Court Rule 10, for granting a writ of certiorari in this case. The rulings of the Fifth Circuit are consistent with Rule 35 of the Federal Rules of Appellate Procedure and the corresponding Local Rules of the Fifth Circuit. Moreover, there is no conflict in the circuits on this point and the issue is neither necessary to maintain uniformity of the circuits' decisions nor is it a question of exceptional importance.

II.

DID THE FIFTH CIRCUIT ERR IN DENYING ATTORNEY FEES UNDER § 28(b) OF THE LHWCA FOR CLAIMANT'S UNSUCCESSFUL PROSECUTION OF A CLAIM FOR AN INJURY EVEN THOUGH CLAIMANT SUBSEQUENTLY ACHIEVED PARTIAL SUCCESS ON A SEPARATE CLAIM FOR A LATER AGGRAVATION OF THE INJURY?

The LHWCA provides that an employer is responsible for the claimant's attorney's fees where the claimant utilizes the services of an attorney who is successful in the prosecution of his claim. 33 U.S.C. § 928. Section 28(a) is applicable where the employer has paid no compensation at all. 33 U.S.C. § 928(a). Section 28(b) is applicable

where, as here, the employer has paid some benefits and the claimant seeks additional benefits. 33 U.S.C. § 928(b). In order to be successful under § 28(b), the claimant's attorney must be successful in obtaining greater compensation than the amount previously paid by the employer. 33 U.S.C. § 928(b); *Universal Terminal and Stevedoring Corp. v. Parker*, 587 F.2d 608 (3rd Cir. 1978). Additionally, the Act states as follows:

> If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. § 928(b).

A claimant's attorney is entitled to separately petition for an employer-paid fee for work performed before the Benefits Review Board and the court of appeals when his appeal has been successful in obtaining greater benefits. 33 U.S.C. § 928(c); 20 C.F.R. § 702.132 (1985); *Ford Aerospace & Communication Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982). The intent behind the award of attorney fees in the LHWCA is to assess attorney fee liability on an employer only when the claimant is ultimately successful on the claim. *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981). A determination of whether the claim is ultimately successful may require the resolution of an issue on remand before the determination as to

success can be made. *Hole*, 640 F.2d at 774; *Murphy v. Honeywell, Inc.*, 20 BRBS 68 (1986).

Upon conclusion of the remand proceedings, Darby's attorney in the case at bar submitted a fee petition to the Fifth Circuit asserting that since the 1987 injury was "irrevocably intertwined" with the 1992 injury, then he is entitled to recover for time spent on his unsuccessful appeals in connection with the 1987 injury. He cites to this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), regarding the test for awarding attorney fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. The *Hensley* test has also been utilized in cases involving attorney fees under the LHWCA. *See The George Hyman Const. Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988). The test under the *Hensley* case for determining a reasonable fee is (1) did the claimant's unsuccessful claims relate to the claims on which he was successful; and (2) did the claimant succeed at a level that makes the hours reasonably expended a satisfactory basis for a fee award. 461 U.S. at 434.

However, the *Hensley* test is only applied after the claimant has prevailed. 461 U.S. at 433. *See also Farrar v. Hobby*, 506 U.S. 103 (1992). The LHWCA reflects that to prevail, the attorney must be successful in obtaining additional compensation. 33 U.S.C. § 928(b). In the case at bar, Darby was unsuccessful in his appeals to the Benefits

Review Board and the Fifth Circuit in connection with the 1987 injury. *Id.*, A-42 – A-44.[6]

Darby did sustain a second injury on May 8, 1992, which resulted in increased work limitations. Although the 1992 injury was an aggravation of the 1987 injury, the aggravation of a prior injury constitutes a new injury making the entire resulting disability compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In other words, but for the 1992 injury, Darby would not have been awarded any additional compensation. Moreover, the mere fact that the 1992 injury incorporated the first injury does not mean that the claim based on the 1987 injury alone incorporated the second injury.

Even if the *Hensley* test is applicable, it is contrary to Darby's position. *Hensley* notes that "where the plaintiff failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." 461 U.S. at 440. In distinguishing an unrelated claim from a related claim, this Court suggested that a related claim will involve a common core of facts, be based upon related legal theories, counsel's time will be devoted to the litigation as a whole, and it will be difficult to divide the fees on a

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[6] It is only the fees before the Benefits Review Board and the Fifth Circuit which are at issue here. Ingalls paid Darby's attorney's fees for time incurred before the administrative law judge. EX 31, p.2.

claim-by-claim basis. 461 U.S. at 435. None of the foregoing is true in this case. First, the facts presented to the Benefits Review Board and the Fifth Circuit did not include any facts concerning the 1992 injury, which occurred after the record was closed with respect to the 1987 injury claim. Moreover, Ingalls was not required to defend any claim before the Benefits Review Board and the Fifth Circuit other than the claim which was made for the 1987 injury. *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 614 (1982). Second, the legal issues presented in the claim for permanent total disability for the 1987 injury are readily distinguishable from those presented in pursuing compensation for the 1992 injury, which was based upon the aggravation of a pre-existing condition. Third, the time of Darby's attorney before the Board and the Fifth Circuit was not devoted to the litigation as a whole. Instead, it was limited to pursuing an unsuccessful appeal based on that record in connection with the 1987 injury alone. 33 U.S.C. § 928(c); 33 U.S.C. § 921(b)(3); FRAP 16. Fourth, the time expended by opposing counsel on the claim for the 1987 injury is easily separable from the time expended on the 1992 claim, since all of the time before the Benefits Review Board and the Fifth Circuit is limited to the record made solely in connection with the 1987 injury.

In *The George Hyman Construction Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992), the D.C. Circuit ruled that an unsuccessful claim for permanent total disability pursuant to § 908(a) is distinct from a claim for a scheduled award pursuant to § 908(c). 963 F.2d at 1540. In denying fees incurred on the unsuccessful issue, the D.C. Circuit noted that the claims were based on different factual and

legal theories despite the fact that they arose out of the same accidental injury. 963 F.2d at 1540. Accordingly, Darby's unsuccessful pursuit of a claim for a different injury based upon different factual and legal theories would surely qualify as a distinct and unrelated claim.

In *Hensley* this Court noted that "the congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 461 U.S. at 435. The foregoing is the exact situation in the case at bar. The claim for the 1987 injury, which was filed on November 8, 1988, was a totally separate claim from the claim filed nearly eight years later for the 1992 injury. *See* EX 9, EX 39.

Darby failed to prevail on his appeal with respect to the 1987 claim, which was separate and distinct from his 1992 claim. The mere fact that the *injuries* were interrelated, since the second injury was an aggravation of the first, does not change the fact that the *claims* were separate and distinct. In fact, the administrative law judge specifically noted in both his Decision and Order Awarding Compensation Benefits and his Order Denying Claimant's Motion for Reconsideration that the claims were separate and distinct, and this finding was never appealed. Pet. App. A-15, A-40, A-58, A-64.

III.

DID THE DENIAL OF ATTORNEY FEES CONSTITUTE AN IMPERMISSIBLE INTERFERENCE WITH CLAIMANT'S RIGHT TO COUNSEL?

The LHWCA provides that a claimant has a right to an attorney. 33 U.S.C. § 928; 20 C.F.R. § 702.131 (1985). Further, the Act provides that if the claimant is successful in obtaining greater benefits than those previously paid, then the claimant is entitled to have his attorney fees paid by the employer. 33 U.S.C. § 928(b); 20 C.F.R. § 702.134(b) (1985); *The George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1536 (D.C. Cir. 1992). If the claimant is successful in review proceedings, he may separately apply to the Benefits Review Board or to the Court for the award of an attorney fee for the time incurred before them. 33 U.S.C. § 928(b). In all other cases, the claim for attorney fees is not assessed against the employer or carrier. *Id.*; 20 C.F.R. § 702.133 (1985). The LHWCA also incorporates, however, a provision that prohibits an attorney from receiving a fee unless approved by the appropriate agency or court. 33 U.S.C. § 928(e). Basically, Darby argues that the denial of attorney fees for the separate pursuit of unsuccessful claims which are subsequently consolidated with claims upon which the claimant is partially successful and receives a fee, will drive competent counsel away. Initially, Darby's petition overlooks the heavy presumption of constitutionality which is accorded the Congress in enacting the LHWCA. *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 319 (1985). One challenging the law must make an extraordinary showing of probability of loss of competent counsel under the present

system. *Id.* at 326. Darby has failed to make such a showing.

In *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed. 2d 701 (1990), this Court held that a similar challenge to the attorney fee award provisions of the LHWCA failed to rebut the heavy presumption of constitutionality. Specifically, in *Triplett*, an attorney challenged the constitutionality of the attorney fee provision of the Longshore Act which is applicable to black lung claimants, since it deprived claimants of legal assistance in the prosecution of their claims. In upholding the constitutionality of the attorney fee provision of the LHWCA, the Court noted as follows:

> The government pursues an obvious and legitimate interest through the current regime. The regulation of attorneys fees payable by claimants themselves is designed to protect claimants from their "improvident contracts, in the interest not only of themselves and their families but of their public." *Yeiser v. Deisart*, 267 U.S. 540, 541, 45 S.Ct. 399, 400, 69 L.Ed. 775 (1925) (upholding similar state limitation). When fees are payable by persons other than the claimants, as Congress has provided, regulation is designed to assure fairness to the employer, carrier, or trust fund, and to protect those sources from a depletion that would leave other claimants without a source of compensation.

494 U.S. at 722.

Moreover, this Court noted in *Triplett* that the claimant has a substantial burden to prove that limitations on the award of attorney fees make attorneys unavailable to

claimants. Specifically, the Court required that the claimant prove that (1) claimants could not obtain representation and (2) that the inability to obtain representation was due to the attorney fee provision of the Act. 494 U.S. at 722. In *Triplett*, the Court held that the testimony of three lawyers that the current system discourages attorneys from practicing under the Act was held insufficient to meet the burden of proof. 494 U.S. at 723-24. Without question, the naked allegations in Darby's petition are insufficient to challenge the constitutionality of the attorney fee provisions of the LHWCA.

Darby has not had any problem in obtaining counsel. In fact, he obtained the same attorney who pursued his 1987 claim to pursue his 1992 claim. His attorney was duly awarded a fee by the administrative law judge for his partial success on the 1992 claim and that fee is not in issue. He was also awarded a fee for his pursuit of the 1987 claim before the administrative law judge and that fee was paid by Ingalls. It is only the fee for his unsuccessful appeals to the Benefits Review Board and the Fifth Circuit with respect to the 1987 accident which is at issue here.

Darby asserts that the denial of fees for an "irrevocably intertwined" claim would deprive similarly situated claimants of the right to counsel. However, the claim for the 1987 injury was separate and distinct from the claim for the 1992 injury. His partial success in the 1992 claim, for which his attorney has already been awarded attorney fees, did not rely upon his unsuccessful appeals in connection with the 1987 claim. To the contrary, a claim based upon an aggravation compensates the entire resulting disability without regard to the compensability of the

underlying condition. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Additionally, where there are two work related injuries, as here, and the second injury aggravates the first, then the second injury becomes the compensable injury. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986). Moreover, the incorrect assumption of Darby's attorney that he had an ethical obligation to pursue the unsuccessful appeals with respect to the 1987 accident before he could pursue the successful claim for the 1992 accident does not justify the award of attorney fees. *Murphy v. Honeywell, Inc.*, 20 BRBS 68, 71 (1986).

Attorney fees are payable for assisting claimants in recovering additional compensation, not for filing frivolous appeals. Darby's attorney has already been awarded all the attorney fees to which he is entitled. His petition is without any legal or factual basis.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: January 14, 2000

RESPONDENT'S APPENDIX 1

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III **TEL. 504-589-6514**
CLERK **600 CAMP STREET**
NEW ORLEANS, LA 70130

August 2, 1999

Mr. Blewett William Thomas
7115 Dubies Drive
San Antonio, TX 78216

No. 96-60029 Darby v. Ingalls Shipbuilding USDC
No. BRB #92-1547

Dear Mr. Thomas:

We are in receipt of your petition for en banc determination in regard to the above referenced case. In light of there be no provision in the rules from the filing of an en banc petition from a non-dispositive order, your petition is being returned to you unfiled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ L. Adams
L. Adams, Deputy Clerk

cc: Mr. Paul B. Howell
Mr. Mark Ambrose Reinhalter

RESPONDENT'S APPENDIX 2

(b) If the employer or carrier pays or tenders payment of the compensation without an award pursuant to section 14(a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in Section 7(e) and offers to tender an amount of compensation based upon the degree of length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be

made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. § 928(b)